

In the Matter of)
Rules and Regulations Implementing) CG Docket No. 02-278
the Telephone Consumer Protection Act)
of 1991)

To date, I have filed small claims actions, pursuant to 47 U.S.C. § 227(b)(3), against two Virginia businesses that directed pre-recorded commercial advertisements to my residence. I obtained judgments in both actions and am attempting to collect on the judgments. I feel that the deterrent effect of the private enforcement action would be more effective if it were paired with a do-not-call (“DNC”) registry similar in operation and scope to that proposed by the Federal Trade Commission (“FTC”). Based on my experience with TCPA private rights of action, I am not convinced that the TCPA’s private right of action provides the same scope of deterrent effect that would be provided by revised Commission rules that create a national DNC registry to cover jurisdictional territory that is outside the FTC’s jurisdictional reach. Other practices the

Commission should consider in any revisions proposed for its rules implementing the TCPA: 1) the use of pre-recorded commercial advertisements and solicitations; and 2) the use of predictive dialer equipment.

1. Pre-recorded commercial advertisements and solicitations

The Commission should make clear that the reach of the definition of “property, goods, or services” defined at 47 C.F.R. 64.1200(f)(5) is broad and capable of application to pre-recorded solicitations that defended by their distributors, when warned of their violation of the TCPA, as exempt from the reach of the TCPA because they don’t advertise a “good or service.” Such advertisements typically “invite” the recipient to call a toll-free number or visit a website to find out more information about an “exciting opportunity.” Pre-recorded advertisements of the type set forth below are every bit as disruptive and aggravating as pre-recorded advertisements that describe house-painting services. What follows is a transcript of a recently received version of one such call:

Hello, sorry we missed you. This is [company] calling. We’re doing a search in the Washington, DC metro area for people who would like to work from home. If you are teachable and would like to start working from home, we would like to send you our free fourteen page information booklet to see if this is right for you. Just call [toll free number] to hear pre-recorded information and to order the free booklet. Your free red booklet will be sent to you within forty-eight hours. Thank you and have a great day.

As is evident to the recipient, the above advertisement appears commercial in nature and discusses an alternative to a paying job that can be pursued at home. The notion that the above message can’t be described as an advertisement for some type of service beggars belief, yet that is precisely the response I received from the person who directed it to my home. The advertiser’s response to my complaint about the above advertisement indicated that legal advice obtained by his company indicated that such a call, while acknowledged to be pre-recorded and been made for a commercial purpose, did not transmit an “unsolicited advertisement.” The advertiser went on to quote the TCPA’s definition of “unsolicited advertisement” found in 47 U.S.C. § 227(a)(4), and report the advertiser’s “victory” as a defendant in several small claims actions another state. While I believe that I could make a good faith argument that such a call is indeed an “unsolicited advertisement,” to allow advertisers of such services to exploit what they perceive to be an exemption for their activities does not help the cause of the plaintiff in a private TCPA action. The state small claims court forum is the most appropriate for the citizen

enforcement suits envisioned by Congress when it enacted the TCPA. In my opinion enterprising violators of the TCPA should not be given the opportunity to obtain a “free pass” from small claims courts because they are successful at muddying the waters regarding the applicability of the TCPA to their activities. The Commission should refine its rules to clearly state that such activities are within the definition of activities prohibited by the TCPA and the Commission’s rules. To underscore my assertion that the above advertisement is sufficiently “commercial” in nature to be within the scope of the TCPA, the transcript of the pre-recorded message is as follows:

Hello and thank you for calling. You know working from home with mail order is one of the fastest growing industries in the world. It is a 450 billion dollar industry and we need help in our business. This is not a lay on the couch get rich quick scheme. Our company is a Fortune 500 corporation and was recently picked by Business Weekly and the Los Angeles Journal as the fastest growing company in the industry. We have a free fourteen page informational booklet that we’d like to send to you on how you can earn 500 to 2500 dollars a month part time and 3000 to 7000 or much, much, more on a full-time basis. Within 48 hours your booklet will be sent to you. [The message finishes with a request for contact a mailing address and phone number.]

2. Predictive Dialer Equipment

The use of predictive dialer equipment has increased to what I believe, as a recipient of such calls generated by such equipment, are intolerable levels. I leave for other more soundly researched commentators the task of describing the precise numbers of calls generated by such equipment. I would like to share a few issues that I feel are supportive of a call for more restrictions on what the FTC has termed “abusive marketing practice”: a) transmittal of CallerID information and b) the abandonment rate for calls generated by predictive dialers.

a. Transmittal of CallerID Information

The telemarketing industry’s claimed inability to display Caller ID information on a T1 or trunk line should not enable it to successfully argue against a requirement that Caller ID information--sufficient to allow a residential customer to direct a DNC list request to the appropriate party--be displayed with each outgoing telemarketing call. While consumers can choose whether or not to block their outgoing Caller ID information, a business making telemarketing calls should have no such privacy interest. The very nature of a telemarketing

business is supposedly presenting a purchase opportunity at the telephonic threshold of a telephone customer. What business so engaged would want to suppress identifying information?

b. Abandonment Rate for Predictive Dialers

The Commission should give serious consideration to restricting the use of predictive dialing equipment. In the alternative, predictive dialers should only allowed if predictive dialer use conforms to one or more of the following parameters:

- a) abandonment rate not higher than 2 percent
- b) two abandoned calls to a number in a month requires manual dialing;
- c) abandoned calls should play a voice message providing a contact phone number (providing Do Not Call list contact at the beginning and end of the message);
- d) when predictive dialers are used, the call MUST display a number to which a consumer can direct a DNC list request.

Widespread use of predictive dialers has spawned a growth industry in devices advertised to block telemarketing calls made by a predictive dialer. One such device, the "Telezapper," is marketed with the promised ability to reduce telemarketing calls by playing a portion of the first of the series of Special Information Tones ("SIT") to indicate an "out of service" or "disconnected" number.¹ To obtain results similar to those of a Telezapper, a consumer could obtain, from various websites, a .wav file of the Service Information Tones, and record them into

¹ I quote the following from the Telezapper website (<http://www.telezapper.com/default.asp>):

How It Works

Ninety percent of all telemarketing calls are dialed by a computer at random. When you answer your phone, the computer connects you to a live telemarketer. Now you can protect your privacy and eliminate disruptive computer-dialed telemarketing calls with the TeleZapperTM.

When you or your answering machine picks up a call, TeleZapperTM emits a special tone that tells the computer your number is disconnected. Within seconds, your phone number is deleted from the computer's list. As your number is eliminated from more and more lists, those annoying computer-dialed calls virtually stop altogether.

See U.S. Patent No. 5,920,623 "Method and apparatus for defeating a predictive telemarketing system" Inventors: Bensman, R. et al. It should not escape the FTC's notice that patent 5,920,623 is assigned to Ver-A-Fast, an Ohio business that provides "verification" of telephone directories, "refresh[ment]" of Do-Not-Call lists, "friendly" collection calls and other services that seemingly place it in the field of telemarketing. The Ver-A-Fast website <http://www.verafast.com> contains more information on their services. Ver-A-Fast appears to be shrewd in its ability to make money as it sells products and services that would appear to be at odds with one another.

their answering machine or voicemail greeting. The availability of such a device is very helpful to consumers, but its benefits may be short-lived. However, it is entirely possible that telemarketers using predictive dialers will adopt technology or dialing practices designed to thwart the benefits of devices such as the Telezapper (e.g., changing predictive dialer algorithms so as to not exclude numbers from the dialer's database for which the dialer records a "disconnected" Service Interruption Tone.) With just a few tweaks, a predictive dialer operator could negate the benefits consumers obtained by purchasing a \$40 product.

CallerID technology has provided consumers with a much-needed tool to fend off unwanted telephone calls. Private callers wishing to block their identity are allowed to do so, and, for an additional fee (as is the case with my local telephone company), telephone subscribers are able to purchase a feature that will block calls that have "unavailable," "anonymous," or "out of area" as their identifying information. However, all of the benefits proposed by a national do-not-call registry could be largely unobtainable if irresponsible telemarketers continue to use predictive dialers in tandem with CallerID blocking. Without CallerID information, consumers would not have the necessary information to register a complaint about violations of a do-not-call registry.

In summary, the Commission should begin to consider how much of the burden of avoiding unwanted telemarketing calls should fall upon the consumer. From my personal perspective, the primary reason for paying the extra monthly fee for CallerID is to be able to screen out calls that I do not want, such as telemarketing calls, and such calls are without exception, identified as: "unknown," "out of area," or "anonymous." If I choose to speak with a telemarketer in order to request that I be placed on a Do Not Call list, then I will answer an "unknown" call. Predictive dialers do not allow me to communicate my wishes to the telemarketer, but depending on how the dialer is configured, might result in several additional calls from that telemarketer, some resulting in "dead air" or hang-ups. The purchase of devices such as the Telezapper, and services such as CallerID and anonymous call blocking should represent the full extent of expenditures that consumers are reasonably expected to make in order to avoid telemarketing calls and have sufficient information to request inclusion on Do Not Call

lists or report telemarketing abuses. It is time for some of the financial burden and adoption of technological methods² to be shifted to the telemarketing industry.

I thank the Commission for consideration of my comments.

Sincerely,

Scott McClure

² Technological advances can, indeed, provide some solutions to the current woes that ail American consumers. A check of the United States Patent and Trademark ("USPTO") office website on April 12, 2002 revealed the following patents:

U.S. Patent No. 6,330,317 Call Blocking System (describing a "call blocking system" which, when installed on the central switching location, reviews calls outgoing calls by a telemarketer and compares them to DNC-lists and blocks calls, in real-time, to telephone numbers on the list.) This patent describes a device that could be used in conjunction with data stored in a national Do Not Call registry.

U.S. Patent No. 6,130,937 System and Process for Automatic Storage, Enforcement and Override of Consumer Do-Not-Call Lists (describing a system for integrating lists of numbers from do-not-call lists into a telephone dialing system.)

An April 2002 search of "telemarketing" on the USPTO's website generated a list of 343 patents with "telemarketing" in at least one field.